A

John Ambrose v Peter Anthony & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(IM)(NCVC)-244–02 OF 2016
TENGKU MAIMUN, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
23 MARCH 2017

C

Contract — Agreement — Oral agreements — Payment of agreed commissions for securing projects — Whether parties entered into agreements — Vitiating factors — Illegality — Whether agreements rendered illegal — Whether agreements against public policy — Whether plaintiff used his position to secure projects for benefit of second defendant — Counterclaim — Recovery of property — Whether plaintiff entitled to be restored or compensated for expenses spent in renovating property

D

The plaintiff's claim against the defendants was founded on oral agreements entered into between the plaintiff and the first defendant, the director and majority shareholder of the second defendant company. Pursuant to the oral agreements made between the years 2009 and 2010 the first defendant had requested the plaintiff to secure for the benefit of the second defendant two government projects in Labuan and Kota Kinabalu ('the projects'). In consideration of the plaintiff securing the projects for the benefit of the second defendant, the first and second defendants had jointly agreed to pay the plaintiff a commission at the rate of 10% of the total contract value of the projects ('the commission') and a further sum of RM20,000 per month until the completion of the two projects, including any variation orders thereto ('the additional commission'). Sometime in early 2010, the plaintiff and the first defendant agreed to vary the agreement on the plaintiff's commission, with part of the commission in the sum of RM500,000 to be paid by way of payment in kind whereby the first defendant was to transfer to the plaintiff, the first defendant's house situated in Kota Kinabalu, Sabah ('the property'). As the property was charged to the bank at the time it could not be transferred to the plaintiff. However, the plaintiff was allowed to occupy the property rent free. When the defendants failed to pay the commissions due to the plaintiff, the latter filed a claim against the defendants. In essence, the plaintiff's claim was for payment of the agreed commissions pursuant to the oral agreements. The defendants, in their joint statement of defence denied the oral agreements but pleaded that the plaintiff had been paid a total sum of RM1,290,000 being payment of professional fees, service charges and loan advanced to the plaintiff by the second defendant. As regards the property, whilst it was admitted that the plaintiff had been allowed to stay in the property, it was pleaded that the

E

F

G

H

I

plaintiff had been given notice to vacate the property, which the plaintiff had failed to comply with. The first defendant thus counterclaimed for the recovery of possession of the property occupied by the plaintiff. The trial judge, whose decision was based largely on the decision of the Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 ('the *Merong Mahawangsa*'s case'), found that the plaintiff as a lobbyist had used his position to secure the projects for the benefit of the second defendant from the government. He thus held that the oral agreements were illegal and dismissed the plaintiff's claim, while allowing the first defendant's counterclaim. This was the plaintiff's appeal against that decision on the grounds that the trial judge had, inter alia, erred in failing to apply the correct test on illegality, the trial judge had erred in not making a proper distinction between the instant case and the *Merong Mahawangsa*'s case, and the trial judge had erred in failing to give effect to s 66 of the Contract Act 1950 ('the Act'). The plaintiff submitted that the present case was distinguishable from the *Merong Mahawangsa*'s case in that, the plaintiff in the instant case had not pleaded that he had used his position or influence to procure the projects for the second defendant.

Held, dismissing the appeal with costs:

(1) Based on the notes of proceedings it was clear that the plaintiff and the first defendant had entered into oral agreements sometime in 2009 and 2010. Throughout his cross-examination, the plaintiff had been consistent as to the existence of the oral agreements between himself and the first defendant for payment of the agreed commissions. Further, the first defendant in his evidence admitted to the various payments made to the plaintiff for the plaintiff's 'professional assistance and services to the second defendant'. It was more probable that these payments were part payments of the commissions agreed between the plaintiff and the first defendant pursuant to the oral agreements. Likewise, the fact that the plaintiff was allowed to be in possession of the first defendant's property without any rental, would lend support to the plaintiff's assertion on the variation of the oral agreement where payment of the sum of RM500,000 was to be paid in kind. Apart from the oral testimony of the witnesses, the letter dated 29 November 2013 from the plaintiff to the first defendant's solicitors had explicitly stated the existence of the oral agreements. In the circumstances, it was clear that there were in existence oral agreements between the plaintiff and the first defendant and that the payments made to the plaintiff, were part payments of the commissions under the oral agreements (see paras 27–34).

(2) The most pertinent principle encapsulated in the *Merong Mahawangsa*'s case was that the courts were bound at all stages to take notice of illegality, whether ex facie or which later appeared, even though not pleaded, and that it was contrary to public policy that a person should be hired for

money or valuable consideration, to use his position and interest to procure a benefit from the government. Although the plaintiff in the instant appeal had not stated that he had used his position and influence to procure the projects for the second defendant, it was not necessary that the exact words of 'used the position and influence and good relationship with the Government of Malaysia' should emerge in the evidence. In the instant appeal, it was clear from the evidence that the plaintiff had the position, influence and good relationship with the Prime Minister cum Minister of Finance, Minister of Higher Education and various officers and that it was through the plaintiff's acquaintance and good relationship with the above personalities that he succeeded in procuring the projects for the second defendant. Hence, notwithstanding the fact that the plaintiff had not stated expressly in his evidence that he had used his influence or good relationship with the government, the principles enunciated in the *Merong Mahawangsa*'s case were applicable to the instant appeal. Hence, the oral agreements were illegal under s 24(e) of the Act (see paras 41–44 & 51).

(3) The occupation (and thereafter the renovation) of the first defendant's property by the plaintiff were pursuant to the illegal oral agreements. The parties were in *pari delicto* when they entered into the illegal oral agreements. As such, the plaintiff was not entitled to be restored or compensated for the expenses spent on the renovation of the property as this was not a case where the contract may be said to be discovered to be void under s 66 of the Act. Thus, the trial judge had not erred when he allowed the first defendant's counterclaim for the recovery of the possession of the property without making an order for restitution of the amount expended by the plaintiff for the renovation (see paras 52 & 55–56).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah berasaskan perjanjian lisan yang dibuat antara plaintif dan defendan pertama, pengarah dan pemegang saham majoriti syarikat defendan kedua. Berdasarkan perjanjian lisan yang dibuat antara tahun 2009 dan 2010, defendan pertama meminta plaintif untuk mendapatkan dua projek kerajaan di Labuan dan Kota Kinabalu ('projek') bagi manfaat defendan kedua. Sebagai balasan kepada plaintif yang menjamin projek-projek itu untuk faedah defendan kedua, defendan pertama dan kedua bersetuju untuk membayar plaintif komisen pada kadar 10% daripada jumlah nilai kontrak projek ('komisen') dan sejumlah wang tambahan sebanyak RM20,000 sebulan sehingga selesai kedua-dua projek, termasuk apa-apa perintah perubahan padanya ('komisen tambahan'). Pada awal tahun 2010, plaintif dan defendan pertama bersetuju mengubah perjanjian mengenai komisen plaintif, dengan sebahagian daripada komisen itu berjumlah RM500,000 yang akan dibayar dengan cara pembayaran iaitu defendan

pertama akan memindahkan kepada plaintif, rumah defendan pertama yang terletak di Kota Kinabalu, Sabah ('hartanah'). Memandangkan hartanah tersebut dipajakkan pada bank pada masa itu, ia tidak dapat dipindahkan kepada plaintif. Walau bagaimanapun, plaintif dibenarkan menduduk-sewa hartanah secara percuma. Apabila defendan gagal membayar komisen kerana plaintif, pihaknya memfailkan tuntutan terhadap defendan. Pada dasarnya, tuntutan plaintif adalah bagi tuntutan komisen yang dipersetujui menurut perjanjian lisan. Defendan, dalam pernyataan pembelaan bersama mereka, menafikan perjanjian lisan tetapi mengaku bahawa plaintif telah dibayar sebanyak RM1,290,000 iaitu yuran profesional, caj perkhidmatan dan pinjaman yang didahulukan kepada plaintif oleh defendan kedua. Mengenai harta itu, walaupun diakui bahawa plaintif dibenarkan menddukinya, plaintif telah diberi notis untuk mengosongkannya dan ini gagal plaintif patuhi. Defendan pertama itu dengan demikian menuntut pengambilan semula harta yang diduduki plaintif. Hakim bicara, memutuskan berdasarkan keputusan Mahkamah Persekutuan dalam *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212 ('kes *Merong Mahawangsa*'), mendapati plaintif, sebagai pelobi, telah menggunakan jawatannya untuk menjamin projek-projek demi kepentingan defendan kedua. Oleh itu, beliau berpendapat perjanjian lisan ini menyalahi undang-undang dan menolak tuntutan plaintif dan membenarkan tuntutan balas defendan pertama. Ini adalah rayuan plaintif terhadap keputusan tersebut atas alasan hakim bicara terkhilaf kerana dalam kegagalan menggunakan ujian yang sepatutnya bagi ketaksahan, hakim bicara terkhilaf dalam tidak membuat perbezaan yang tepat antara kes ini dan kes *Merong Mahawangsa*, dan hakim bicara terkhilaf apabila gagal menguatkuasakan s 66 Akta Kontrak 1950 ('Akta'). Plaintif menghujahkan bahawa kes ini berbeza dengan kes *Merong Mahawangsa* kerana plaintif dalam kes ini tidak mengaku dia menggunakan kedudukan atau pengaruhnya untuk mendapatkan projek defendan kedua.

Diputuskan, menolak rayuan dengan kos:

(1) Berdasarkan nota prosiding, jelas bahawa plaintif dan defendan pertama memasuki perjanjian lisan pada tahun 2009 dan 2010. Sepanjang pemeriksaan balasnya, plaintif konsisten tentang kewujudan perjanjian lisan antara dirinya sendiri dengan defendan pertama untuk membayar komisen yang dipersetujui. Selain itu, defendan pertama dalam keterangannya mengakui tentang pelbagai bayaran yang dibuat kepada plaintif untuk 'bantuan profesional dan perkhidmatan plaintif kepada defendan kedua'. Adalah lebih berkemungkinan bahawa bayaran ini sebahagian bayaran komisen yang disetujui antara plaintif dan defendan pertama menurut perjanjian lisan. Begitu juga, hakikat bahawa plaintif dibenarkan memiliki harta defendan pertama tanpa apa-apa sewa, menyokong dakwaan plaintif tentang pengubahan perjanjian lisan iaitu

bayaran jumlah wang sebanyak RM500,000 akan dibayar dalam bentuk kebendaan. Selain keterangan lisan saksi, surat bertarikh 29 November 2013 dari plaintif kepada peguamcara pertama defendan menyatakan secara nyata kewujudan perjanjian lisan. Dalam keadaan ini, jelas wujud perjanjian lisan antara plaintif dan defendan pertama dan bayaran yang dibuat kepada plaintif, adalah bahagian bayaran komisen bawah perjanjian lisan (lihat perenggan 27–34).

(2) Prinsip paling penting dalam kes *Merong Mahawangsa* adalah bahawa mahkamah terikat di semua peringkat untuk mengambil notis ketidaksahan, sama ada ex facie atau yang mana muncul kemudiannya, walaupun tidak diplidkan dan bertentangan dengan dasar awam bahawa orang diupah dengan wang atau balasan berharga, untuk menggunakan kedudukan dan kepentingannya untuk mendapatkan manfaat daripada kerajaan. Walaupun plaintif dalam rayuan ini tidak menyatakan bahawa dia menggunakan kedudukan dan pengaruhnya untuk mendapatkan projek-projek untuk defendan kedua, tidaklah perlu menggunakan kata-kata tepat 'menggunakan kedudukan dan pengaruh dan hubungan baik dengan Kerajaan Malaysia, dalam keterangan. Dalam rayuan ini, jelas dari keterangan bahawa plaintif mempunyai kedudukan, pengaruh dan hubungan baik dengan Perdana Menteri merangkap Menteri Kewangan, Menteri Pengajian Tinggi dan pelbagai pegawai dan bahawa melalui pengalaman plaintif dan hubungan baik dengan kesemua di atas dia berjaya mendapatkan projek untuk defendan kedua. Walau bagaimanapun, walaupun fakta bahawa plaintif tidak menyatakan secara nyata dalam keterangannya bahawa dia menggunakan pengaruhnya atau hubungan baik dengan kerajaan, prinsip yang dinyatakan dalam kes *Merong Mahawangsa* terpakai pada rayuan ini. Oleh itu, perjanjian lisan adalah menyalahi undang-undang bawah s 24(e) Akta (lihat perenggan 41–44 & 51).

(3) Pendudukan (dan selepas itu pengubahsuaian) hartanah defendan pertama oleh plaintif adalah berdasarkan perjanjian lisan secara tidak sah. Pihak-pihak dalam *pari delicto* ketika memasuki perjanjian lisan secara tidak sah. Oleh itu, plaintif tidak berhak dikembalikan atau diberi pampasan bagi perbelanjaan yang dibelanjakan untuk ubah suai hartanah tersebut kerana ini bukan satu kes di mana kontrak itu boleh dikatakan didapati tidak sah di bawah s 66 Akta. Oleh itu, hakim bicara tidak terkhilaf apabila beliau membenarkan tuntutan balas defendan pertama untuk pengembalian hartanah tersebut tanpa membuat perintah mengembalikan jumlah yang dibelanjakan oleh plaintif bagi pengubahsuaian (lihat perenggan 52 & 55–56).]

Notes

For cases on agreement in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3255–3345.

Cases referred to

Ahmad Zaini bin Japar v TL Offshore Sdn Bhd [2002] 7 MLJ 604; [2002] 5 CLJ 201, HC (refd)

China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1; [2014] 7 CLJ 644, CA (refd)

Holman v Johnson [1775-1802] All ER Rep 98, KB (refd)

Hounga v Allen and another [2014] UKSC 47, SC (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457; [1989] 1 CLJ 897, PC (refd)

Les Laboratoires Servier & Anor v Apotex Inc & Ors [2014] UKSC 55, SC (refd)

Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281; [1992] 3 CLJ 1667, SC (refd)

Ling Hock Ling v Tai Lian Development Co [2006] 6 MLJ 712; [2006] 4 CLJ 396, CA (refd)

Lipton v Powell [1921] 2 KB 51 (refd)

Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd [1971] 2 MLJ 161, FC (refd)

Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81; [1999] 2 CLJ 997, FC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (folld)

Mohd Johari bin Awang v Aneka Prestij Sdn Bhd and another appeal [2014] 5 MLJ 196; [2014] 7 CLJ 737, CA (refd)

Mustafa bin Osman v Lee Chua & Anor [1996] 2 MLJ 141, CA (refd)

Natha Singh v Syed Abdul Rahman & Anor [1962] 1 MLJ 265b (refd)

North Western Salt Ltd v Electrolytic Alkali Co Ltd [1914] AC 461, HL (refd)

Palaniappa Chettiar v Arunasalam Chettiar [1962] 1 MLJ 143, PC (refd)

Public Prosecutor v Dato' Saidin bin Thamby [2012] 3 MLJ 476, CA (refd)

Scott v Brown, Doering, McNab & Co [1892] 2 QB 724, CA (refd)

Soh Eng Keng v Lim Chin Wah [1979] 2 MLJ 91 (refd)

Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd [2014] 3 MLJ 301; [2014] 3 CLJ 141, FC (refd)

Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)

Legislation referred to

Contracts Act 1950 ss 2, 24(e), 66

Appeal from: Civil Suit No BKI-22NCVC-62/7 of 2014 (High Court, Kota Kinabalu)

Sugumar Balakrishnan (Sugumar & Co) for the appellant.
Martin Tommy (Michael Ubu & Co) for the respondents.

Tengku Maimun JCA (delivering judgment of the court):

[1] This is an appeal by the appellant ('the plaintiff') against the order of the High Court at Kota Kinabalu in dismissing his claim against the respondents ('the defendants').

[2] The plaintiff's claim against the defendants was founded on oral agreements entered into between the plaintiff and the first defendant, the director and majority shareholder of the second defendant. The following are the facts pleaded by the plaintiff in his statement of claim.

[3] Pursuant to an oral agreement, the first defendant had requested the plaintiff to secure two projects for the benefit of the second defendant. The projects were for 'Kerja-kerja Penyenggaraan Mekanikal dan Elektrikal di Universiti Malaysia, Sabah, FT Labuan' ('the Labuan UMS project') and 'Cadangan bagi melaksanakan kontrak bagi kerja-kerja penyenggaraan mekanikal, elektrikal dan sivil secara komprehensif di Universiti Malaysia, Sabah melalui kaedah Runding Terus (Skop Bangunan: Bangunan-bangunan di bawah Projek Pembangunan Fasa 2)' ('the Kota Kinabalu UMS project').

[4] In consideration of the plaintiff successfully securing the Labuan UMS project and the Kota Kinabalu UMS project for the second defendant, the first defendant and the second defendant had jointly agreed to pay the plaintiff commission at the rate of 10% of the total contract value of the two projects including any variation orders thereto ('the commission').

[5] In addition to the commission, the first and the second defendants had also agreed to pay the plaintiff a sum of RM20,000 per month until the completion of the Labuan UMS project and the Kota Kinabalu UMS project respectively including any variation orders ('the additional commission').

[6] The plaintiff had successfully secured the Labuan UMS project and the Kota Kinabalu UMS project for the second defendant where the second defendant was awarded the Labuan UMS project for a period of three years with an option to extend for a further two years from 2009 at the contract sum of RM90,000 per month subject to any variation orders thereto. In respect of the Kota Kinabalu UMS project, it was for a contractual period of five years commencing from 2010 at the sum of RM1,200,000 per month subject to any variation orders thereto.

[7] On or about early 2010, the plaintiff and the first defendant agreed to vary the agreement on the plaintiff's commission, ie part of the commission in the sum of RM500,000 shall be paid by way of payment in kind whereby the first defendant shall transfer to the plaintiff, the first defendant's parcel of land

held under Country Lease No 015422250 situated in the District of Kota Kinabalu with a dwelling house erected thereon described as Lot 8, Taman Moonee, Kota Kinabalu, Sabah ('the property'). The property at the material time was charged to Malayan Banking Bhd. Due to the existing charge and pending the first defendant's settlement of the loan with Malayan Banking Bhd, the property could not be transferred to the plaintiff. Vacant possession of the property was however given by the first defendant to the plaintiff. As regards the remaining balance of the commission and the additional commission, payment shall be jointly made to the plaintiff by the first and the second defendants.

[8] Having settled the loan due to Malayan Banking, the first defendant nevertheless failed and neglected to transfer the property to the plaintiff. As for the commission and additional commission, the plaintiff had only received part payments totalling RM800,000 and RM120,000 respectively.

[9] Vide the civil suit, the plaintiff seeks for the following reliefs:

(a) a declaration that the plaintiff is the rightful and beneficial owner of the property;

(b) an order directing the first defendant to cause the property to be transferred to the plaintiff within 30 days from the date of the order;

(c) an account by the defendants of what sum amounts to 10% of the total contract value of the Labuan UMS project and the Kota Kinabalu UMS project;

(d) an order directing that the defendants do pay the plaintiff the sums found due and payable after the taking of the account less the part payments made to the plaintiff; and

(e) alternatively, damages to be assessed.

[10] The defendants, in their joint statement of defence deny the oral agreements but pleaded that the plaintiff had been paid a total sum of RM1,290,000 being payment of professional fees, service charges and loan advance to the plaintiff by the second defendant. As regards the property, whilst it was admitted that the plaintiff had been allowed to stay in the property, it was pleaded that the plaintiff had been given notice to vacate the property, which the plaintiff had failed to comply. The first defendant counterclaims for the recovery of possession of the property occupied by the plaintiff.

[11] The case proceeded to trial and at the conclusion of the trial, the learned trial judge directed parties to file written submission. In the course of clarification of the written submission, His Lordship drew the attention of the parties to the judgment of the Federal Court in *Merong Mahawangsa Sdn Bhd*

& Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212). *Merong Mahawangsa* concerns 'influence peddling' where the Federal Court held that it was against public policy under s 24(e) of the Contracts Act 1950 ('the Act'). A

[12] The trial judge invited parties to submit on (a) whether the contract, if any, was rendered illegal by virtue of it being against public policy pursuant to s 24(e) of the Act; and (b) bearing in mind that the issue of illegality was neither pleaded nor raised in evidence by parties in the course of the trial, whether it was appropriate for the court to act on its own motion to take cognisance of the issue of illegality within the ambit of s 24(e) of the Act. Having considered the further submission of the parties, the learned trial judge dismissed the plaintiff's claim and allowed the first defendant's counterclaim. B C

[13] Aggrieved, the plaintiff filed an appeal to this court. D

THE APPEAL

[14] Learned counsel for the plaintiff raised the following grounds of appeal: E

(a) the learned trial judge erred in finding that the oral agreements were illegal without first making a finding on the existence of the oral agreements;

(b) there was a miscarriage of justice because the illegality point was only raised during the clarification of the submission and the appellant was not able to bring rebuttal evidence; F

(c) the learned trial judge erred in failing to apply the correct test on illegality;

(d) the learned trial judge erred in not making a proper distinction between the instant case and *Merong Mahawangsa*; and G

(e) the learned trial judge erred in failing to give effect to s 66 of the Act.

[15] Before we proceed to consider the grounds, it is perhaps appropriate to set out the case of *Merong Mahawangsa* which forms the basis of the decision of the learned trial judge in dismissing the plaintiff's claim. H

[16] In *Merong Mahawangsa*, pursuant to a letter of undertaking, the respondent claimed a sum of RM20m, being the payment agreed upon by the appellants for services rendered by the former in obtaining and securing the tender of the Johore-Singapore bridge project ('the bridge project'). It was the respondent's case that he had used his influence and good relationship with the Government of Malaysia to procure the bridge project for the benefit and interest of the first appellant. In his amended statement of claim, the I

respondent particularised his close relationship with named Federal Ministers and his dealings with Federal Ministers with respect to the bridge project. The first appellant pleaded in its defence that the procurement of the bridge project on account of the respondent's close relationship with the Government of Malaysia and the Federal Ministers was against public policy and that the letter of undertaking was illegal and void.

[17] The trial judge held that the services rendered by the respondent were not opposed to public policy and that the letter of undertaking was enforceable. The trial judge however made a finding that the bridge project was withdrawn or terminated and did not materialise and that pursuant to the terms of the letter of undertaking, the respondent was not entitled to payment.

[18] The respondent's appeal to this court was allowed and the appellants were ordered to pay RM20m to the respondent.

[19] Against the order of this court, the appellants were granted leave to appeal to the Federal Court on the following question:

> Whether an agreement to provide services to influence the decision of a public decision maker to award a contract is a contract opposed to public policy as defined under s 24(e) of the Contracts Act 1950 and is therefore void?

[20] In answering the above question in the affirmative, the Federal Court considered the law relating to s 24 of the Act and made references to the following English and local cases: *Holman v Johnson* [1775-1802] All ER Rep 98; *Hounga v Allen and another* [2014] UKSC 47; *Tan Chee Hoe & Sons Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301; [2014] 3 CLJ 141; *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724; *Lipton v Powell* [1921] 2 KB 51; *North Western Salt Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461; *Les Laboratoires Servier & Anor v Apotex Inc & Ors* [2014] UKSC 55; *Natha Singh v Syed Abdul Rahman & Anor* [1962] 1 MLJ 265b; *Palaniappa Chettiar v Arunasalam Chettiar* [1962] 1 MLJ 143; *Lo Su Tsoon Timber Depot v Southern Estate Sdn Bhd* [1971] 2 MLJ 161; *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 1 CLJ 897; *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281; [1992] 3 CLJ 1667; *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520; and *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1; [2014] 7 CLJ 644.

[21] Reference was also made to *Mulla Indian Contract Act and Specific Relief Acts* (13th Ed, Vol 1) at pp 702–703 which states:

> An agreement, the object of which is to use the influence with the Ministers of Government to obtain a favourable decision, is destructive of sound and good

administration. It showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on their own merits. Such an agreement is contrary to public policy. It is immaterial, if the persons intended to be influenced are not amenable to such recommendations.

[22] The Federal Court held that on the facts and the face of it, it was so plain and obvious that the consideration was unlawful, and that the letter of undertaking was void. On that ground, the claim should have been dismissed.

[23] With the decision of the Federal Court in *Merong Mahawangsa* in mind, we now revert to the instant appeal.

Whether there was in existence oral agreements between the plaintiff and the first defendant

[24] The plaintiff in his statement of claim had pleaded the oral agreements between him and the first defendant in respect of the payment of the commissions in consideration of the plaintiff securing the UMS projects in Labuan and Kota Kinabalu for the second defendant. The defendants on the other hand denied such oral agreements.

[25] Given the variance in the pleadings, learned counsel for the plaintiff submitted that it was incumbent on the trial judge to make a finding on the existence of the oral agreements, before making a finding that the agreements were illegal under s 24(e) of the Act.

[26] Undeniably, the learned trial judge had failed to make a finding on the existence of the oral agreements. However, given that the appeal is a continuation of a hearing, we opine that we are in as good a position to make a finding on this issue.

Our decision

[27] In determining whether there was any oral agreement between the plaintiff and the first defendant, we have taken the liberty to peruse the notes of proceedings and we find that the plaintiff had testified as follows (record of appeal Part A and B: pp 177–178):

Q14: Did anyone request you to secure for the benefit of the 2nd Defendant the Labuan UMS Project and the Kota Kinabalu UMS Project?

A: Pursuant to oral agreements made between the 1st Defendant in his personal capacity and for and on behalf of the 2nd Defendant on two separate occasions sometime on or about between the years 2009 and 2010 the 1st Defendant had requested me to secure for the benefit of the 2nd Defendant the Labuan UMS Project and the Kota Kinabalu UMS Project.

Q15: Where did the formation of the oral agreements take place?

A: The formation of the oral agreements took place at Park Royal Hotel in Kuala Lumpur.

Q16: Apart from the 1st Defendant and yourself, was anyone else present during the said oral agreement?

A: Yes, one Dato' Yahya Bin Hamzah was present.

Q: Was there any terms agreed upon between yourself and the 1st and 2nd Defendants pursuant to the said oral agreements?

A: I say that pursuant to the said oral agreements, the 1st and 2nd Defendants had agreed that in consideration of me successfully securing the Labuan UMS Project and the Kota Kinabalu UMS Project for the benefit of the 2nd Defendant, the 1st and 2nd Defendants had jointly agreed to pay to me a commission at the rate of 10% of the total contract value of the Labuan UMS Project and the Kota Kinabalu UMS Project (hereinafter referred to as 'my commission'). In addition to my commission, the 1st and the 2nd Defendants had also agreed to pay to me a sum of RM20,000.00 per month until the completion of the Labuan UMS Project and the Kota Kinabalu UMS Project respectively including any variation orders thereto (hereinafter referred to as 'my additional commission').

Q: Did you secure the Labuan UMS Project and the Kota Kinabalu UMS Project for the benefit of the 2nd Defendant pursuant to the said oral agreements?

A: Yes. ...

[28] Throughout the cross-examination, the plaintiff was consistent that the oral agreements between him and the first defendant took place at Park Royal Hotel, Kuala Lumpur sometime in 2009 and 2010.

[29] The plaintiff's evidence is supported by Dato' Yahya bin Hamzah ('PW1') who confirmed that he was present at the meeting between the plaintiff and the first defendant at Park Royal Hotel Kuala Lumpur in October 2009. PW1 stated as follows (record of appeal Part A and B: pp 57–59):

Q: Ada apa-apa berlaku semasa kamu berada di situ?

A: Saya mendengar perbincangan mereka, dan Datuk Peter (1st Defendant) menjanjikan kepada Datuk John (Plaintiff) RM20,000.00 setiap bulan, dan 10% komisen daripada amount projek di UMS Labuan.

Q: ...

A: ...

Q: Sila beritahu Mahkamah, siapa yang perlu mendapati projek tersebut dan apakah projek tersebut?

A: Yang mendapat projek tersebut adalah syarikat Asli Jati, dan yang mendapatkan projek tersebut adalah usaha melalui Datuk John (Plaintiff).

Q: ...

A: ...

Q: Pada tahun 2010, adakah kamu berjumpa dengan Plaintif dan 1st Defendant? A

A: Ada.

Q: Di mana?

A: Di tempat yang sama di tingkat 6 executive floor Parkroyal Hotel Kuala Lumpur.

Q: Masih ingat tarikh dan bulan tahun 2010? A: Bulan Februari. B

Q: Apa berlaku semasa kamu berada di situ?

A: Berlaku perbincangan yang sama untuk mendapatkan projek UMS Kota Kinabalu.

Q: Apa ertinya perbincangan yang sama? C

A: Perbincangan yang sama juga, menjanjikan berterusan RM20,000 dan 10% daripada amount projek tersebut.

[30] In cross-examination (record of appeal Part A and B: pp 60–66), PW1 was also consistent in his evidence that he heard the discussion between the plaintiff and the first defendant on the commissions to be paid to the plaintiff for the UMS projects secured by the plaintiff for the second defendant. D

[31] Further, the first defendant in his evidence (record of appeal Part A and B: p 212) admitted to the various payments made to the plaintiff for the plaintiff's 'professional assistance and services to the 2nd Defendant'. In our view, it is more probable than not that the payments made to the plaintiff were part payments of the commissions agreed between the plaintiff and the first defendant pursuant to the oral agreements. Likewise, the fact that the plaintiff was allowed to be in possession of first defendant's property without any rental in our view lend support to the plaintiff's assertion on the variation of the oral agreement where payment of the sum of RM500,000 was to be paid in kind. E F

[32] Apart from the oral testimony of the witnesses, we find that in a letter dated 29 November 2013 addressed to the first defendant's solicitors the plaintiff's solicitors had explicitly stated the existence of the oral agreements pleaded in his statement of claim. The letter reads: G

> We are instructed that pursuant to oral agreements made between your client, in his personal capacity and for an on behalf of Asli Jati Engineering Sdn Bhd ... and our client on two separate occasions, your client had requested our client to secure for the benefit of Asli Jati Engineering Sdn Bhd ... two projects, namely, 'Kerja-kerja penyenggaraan Mekanikal dan Elektrikal di Universiti Malaysia Sabah, FT Labuan' (hereinafter referred to as 'the Labuan UMS Project') and 'Cadangan bagi melaksanakan kontrak bagi kerja-kerja penyenggaraan mekanikal, elektrikal dan sivil secara komprehensif di Universiti Malaysia Sabah melalui kaedah Runding Terus (Skop Bangunan: Bangunan-bangunan di bawah Projek Pembangunan Fasa 2)' (hereinafter referred to as 'the Kota Kinabalu Project'). H I
>
> We are further instructed that in consideration of our client successfully securing the Labuan UMS Project and the Kota Kinabalu UMS Project for Asli Jati

> Engineering Sdn Bhd ... pursuant to the said oral agreements, your client and Asli Jati Engineering Sdn Bhd ... had jointly agreed to pay to our client commission at the rate of 10% of the total contract value of the Labuan UMS Project and the Kota Kinabalu UMS Project including any variation orders thereto (hereinafter referred to as 'our client's commissions').
>
> We are also instructed that, in addition to our client's commissions, your client and Asli Jati Engineering Sdn Bhd ... had also agreed to pay to our client a sum of RM20,000.00 per month until the completion of the Labuan UMS Project and the Kota Kinabalu UMS Project including any variation orders thereto (hereinafter referred to as 'our client's additional commissions').
>
> We are instructed that pursuant to the said oral agreements, our client had successfully secured the Labuan UMS Project and the Kota Kinabalu UMS Project to be awarded to Asli Jati Engineering Sdn Bhd ... wherein the Labuan UMS Project was for the contractual period of 3 years with an option to extend for a further 2 years commencing from the year 2009 at the contract sum of RM90,000.00 per month subject to any variation orders thereto and the Kota Kinabalu UMS Project was for the contractual period of 5 years commencing from the year 2010 at the contract sum of RM1,200,000.00 per month subject to any variation orders thereto.

[33] The first defendant in his evidence admitted having knowledge of the plaintiff's solicitors' letter dated 29 November 2013 yet the first defendant did not at any time respond to or protest the plaintiff's assertions of the oral agreements. In *Ling Hock Ling v Tai Lian Development Co* [2006] 6 MLJ 712; [2006] 4 CLJ 396, this court through Gopal Sri Ram JCA (as he then was) said at p 714 (MLJ); p 400 (CLJ):

> Now, here we have a case where the defendant upon receiving copies of the plaintiff's letters to FELDA did not make any protest about his description as a subcontractor. If it was not the truth he would have said so. But he kept quiet. In these circumstances it does not lie in his mouth to say that he was not the plaintiff's subcontractor. ...

[34] In the light of the above evidence, we find that there are in existence oral agreements between the plaintiff and the first defendant and that the payments made to the plaintiff, are part payments of the commissions under the oral agreements.

Whether the oral agreements are illegal under s 24(e) of the Contracts Act 1950

[35] We will take the second to the fourth issues together. The essence of learned counsel's submission in respect of these issues is that the present case is distinguishable from *Merong Mahawangsa*. Unlike *Merong Mahawangsa*, the plaintiff in the instant case did not plead that he had used his position or influence to procure the Labuan UMS Project and the Kota Kinabalu UMS Project for the second defendant. And unlike *Merong Mahawangsa*, the

defendants in the instant case did not plead illegality. It was the learned trial judge on his own motion who took cognisance of the illegality at the conclusion of the trial having found that the instant case is similar to *Merong Mahawangsa*.

[36] Learned counsel for the plaintiff submitted that there are only two instances where the trial judge can take cognisance of illegality, namely:

(a) where a contract was ex facie illegal irrespective of whether illegality was pleaded; and

(b) where a contract was not ex facie illegal, and the illegality had not been pleaded, the court would still take judicial notice of the illegality if evidence of the illegality emerged in the evidence in court.

[37] In the instant appeal, learned counsel contended that oral agreements are not ex facie illegal or manifestly illegal and the evidence of illegality did not emerge in the trial as to render the said oral agreements illegal and void as against public policy within the ambit of s 24(e) of the Act.

[38] In concluding that the oral agreements are illegal under s 24(e) of the Act, the learned trial judge found (from the admission of the plaintiff in his evidence) that he is a lobbyist and that the plaintiff was to use his position to secure the projects for the benefit of the second defendant from the government.

[39] Learned counsel submitted that being a lobbyist per se does not render the oral agreements to be against public policy and therefore void and unenforceable. He highlighted that the plaintiff did not give evidence that he 'used his influence and good relationship with the Government of Malaysia to procure' the UMS Projects for the second defendant and neither was there in the pleadings nor in the evidence to even remotely suggest 'sale of influence' on the part of the plaintiff. In essence, the plaintiff's claim is for payment of the agreed commissions pursuant to the oral agreements. In this regard, learned counsel emphasised that the oral agreements were commercial contracts and that the courts should be slow to strike down commercial contracts. He relied, among others, on the decision of the Federal Court in *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997 and the decision of this court in *Mohd Johari bin Awang v Aneka Prestij Sdn Bhd and another appeal* [2014] 5 MLJ 196; [2014] 7 CLJ 737.

Our decision

[40] The principles that can be gleaned from *Merong Mahawangsa* are as follows:

A (a) no court ought to enforce an illegal contract where the contract is ex facie illegal, even if illegality was not pleaded;

(b) where the contract is not ex facie illegal and illegality was not pleaded, the court can still take judicial notice of illegality when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality;

B

(c) the court is bound to intervene if illegality is brought to its notice; and

(d) such judicial notice can be taken at any stage, either at the court of first instance or at the appellate stage.

C

[41] In our view, the most pertinent principle encapsulated in *Merong Mahawangsa* is that the courts are bound at all stages to take notice of illegality, whether ex facie or which later appears, even though not pleaded, and that it was contrary to public policy that a person should be hired for money or valuable consideration, to use his position and interest to procure a benefit from the government.

D

[42] At this juncture, it is convenient to peruse the following evidence of the plaintiff (record of appeal Part A and B: pp 514–519):

E

Q19: What steps did you take to secure the Labuan UMS Project and the Kota Kinabalu UMS Project for the benefit of the 2nd Defendant?

A: Subsequent to the oral agreements, I had brought the 1st Defendant to meet the Prime Minister cum Finance Minister at his office ... to discuss the 2nd Defendant's interest in securing the Labuan UMS Project and the Kota Kinabalu UMS Project.

F

Q20: Who was the Prime Minister cum Minister of Finance who you referred to?

A: YAB Dato Seri Najib Tun Razak.

Q21: Prior to the meeting with the Prime Minister cum Minister of Finance, where you personally acquainted with him?

G

A: Yes, as a personal friend and in my capacity as the Chairman of the Penampang UMNO Division and as the Political Secretary to the State Minister of Finance.

Q22: Prior to the meeting with the Prime Minister cum Minister of Finance, was the 1st Defendant personally acquainted with him?

H

A: Absolutely not and it is for this reason why I had to obtain an appointment for the 1st Defendant to meet the Prime Minister cum Minister of Finance.

Q23: What transpired at the meeting with the Prime Minister cum Minister of Finance?

I

A: The Prime Minister cum Minister of Finance endorsed the minutes on the documents, in relation to the Labuan UMS Project and the Kota Kinabalu Project brought by the 1st Defendant.

...

...

Q25: Subsequent to the meeting with the Prime Minister cum Minister of Finance, did anything happen?

A: I had met Dato' Sri (now Tan Sri) Ab Aziz Bin Kasim, the Principal Private Secretary to the Prime Minister, at the Prime Minister's Department ...

Q26: Were you personally acquainted with the said Dato' Sri (now Tan Sri) Ab Aziz Bin Kasim?

A: Yes.

Q27: Was the 1st Defendant present at the meeting with Dato' Sri (now Tan Sri) Ab Aziz Bin Kasim?

A: No.

Q28: What transpired at the meeting with Dato' Sri (now Tan Sri) Ab Aziz Bin Kasim?

A: I was asked to come back in a few days to enable Dato' Sri (now Tan Sri) Ab. Aziz Bin Kasim to do the needful.

Q29: Did you go back to see Dato' Sri (now Tan Sri) Ab Aziz Bin Kasim a few days later?

A: Yes.

Q30: What happened?

A: Dato' Sri (now Tan Sri) Ab. Aziz Bin Kasim informed me that he has done the needful and handed to me a sealed envelope to be hand delivered to Dato' Fauziah Yaacob.

Q31: Who is Dato' Fauziah Yaacob?

A: At the material time, she was Setiausaha Bahagian, Perolehan Kerajaan Kementerian Kewangan and now she is the Deputy Secretary General of Treasury (System & Control) in the Ministry of Finance.

Q32: Were you personally acquainted with the said Dato' Fauziah Yaacob at that stage?

A: Yes.

Q33: What did you do with the sealed envelope given to you by the said Dato' Sri (now Tan Sri) Abd. Aziz Bin Kasim?

A: I personally handed the sealed envelope to the said Dato' Fauziah Yaacob ...

Q34: Was the 1st Defendant present at the meeting with the said Dato' Fauziah Yaacob?

A: No.

Q35: Did anything else happen subsequent to your meeting with the said Dato' Fauziah Yaacob?

A: I met Dato' Sh Mohd Sh Fuzy Sh Ali, the Principal Private Secretary of the Minister of Finance, at the Ministry of Finance ...

Q36: Were you personally acquainted with the said Dato' Sh Mohd Sh Fuzy Sh Ali at that stage?

A: Yes.

Q37: Was the 1st Defendant present at the meeting with the said Dato' Sh Mohd Sh Fuzy Sh Ali?

A: No.

Q38: What was the purpose of you meeting the said Dato' Sh Mohd Sh Fuzy Sh Ali?

A: The purpose of my meeting with the said Dato' Sh Mohd Sh Fuzy Sh Ali was to make inquiries as to when the Ministry of Finance Tender Meeting was going to be held.

Q39: Why do you need to know when the Ministry of Finance Tender Meeting was going to be held?

A: So that I could meet the Prime Minister cum Finance Minister immediately before the Ministry of Finance Tender Meeting in order to remind him of the Labuan UMS Project and the Kota Kinabalu UMS Project.

Q40: Were you able to meet the Prime Minister cum Finance Minister immediately before the Ministry of Finance Tender Meeting?

A: Yes at the Ministry of Finance ...

Q41: Was the 1st Defendant present at the meeting? A: No.

Q42: Did you take any other steps subsequent to the Ministry of Finance Tender Meeting?

A: I met Dato' Sri Nordin Khalid, the then Minister of Higher Education, on two separate occasions at the Ministry of High Education ... to inquire about the approval status of the Labuan UMS Project and the Kota Kinabalu UMS Project.

Q43: Were you personally acquainted with the said Dato' Sri Nordin Khalid at that stage?

A: Yes.

Q44: Was the 1st Defendant present at the meeting with the said Dato' Sri Nordin Khalid?

A: No.

Q45: What was the purpose of you meeting the said Dato' Nordin Khalid?

A: The Labuan UMS Project and the Kota Kinabalu UMS Project came under the purview of the Ministry of Higher Education which is the final approving authority for the aforesaid projects.

Q46: What was the outcome of your meetings with the said Dato' Sri Nordin Khalid?

A: I was informed that the Minister of Higher Education has approved the award of the Labuan UMS Project and the Kota Kinabalu UMS Project to the 2nd Defendant and I was advised to liaise with the Vice Chancellor of University Malaysia Sabah pertaining to the issuance of the letters of award.

Q47: Did you liaise with the Vice Chancellor of University Malaysia Sabah?

A: Yes, I had liaised with Brig Gen Prof Datuk Seri Panglima Dr Kamaruzaman Hj Ampon, the then Vice Chancellor of University Malaysia Sabah in order to expedite the issuance of the letters of award.

[43] Learned counsel for the plaintiff sought to distinguish this appeal with *Merong Mahawangsa* on the ground that nowhere in his evidence did the plaintiff in the instant appeal state that he used his position and influence to procure the UMS projects for the second defendant.

[44] In our judgment, it is not necessary that the exact words of 'used the position and influence and good relationship with the Government of Malaysia' must emerge in the evidence. Suffice if it emerged in the evidence that the plaintiff had the position, influence and good relationship with the government and had used that position, influence and good relationship to procure the UMS projects for the second defendant from the government. We find such evidence in the following testimony of the plaintiff (record of appeal Part A and B: p 73):

Q19: Based on your experience in securing the Labuan UMS Project and the Kota Kinabalu UMS Project, can the 2nd Defendant apply for the said Project without first obtaining the necessary approval from the Federal Minister of Finance?

A: Cannot. Must come first from the Minister, because only the Minister of Finance has the power for negotiate contract. This I am very sure. You can write, but still they have to ask for permission, but definitely must come from the Finance Minister. Only the Minister of Finance can approves (*sic*) negotiated project. (This project is negotiated project.)

Q20: Why do you say so?

A: Because it is only the Minister of Finance has the final say to which project can be negotiated and which project to be open tender. In this case, I was the one who spoke to the Prime Minister to have this company Asli Jati (2nd Defendant) to secure the project.

[45] Learned counsel also highlighted that the plaintiff's claim is for payment of the agreed commission pursuant to the oral agreements and in this connection, relied on *Mohd Johari Awang* which cited *Public Prosecutor v Dato' Saidin bin Thamby* [2012] 3 MLJ 476. In *Dato' Saidin bin Thamby*, this court held that there is nothing wrong in making a commission and that it has been sanctioned in *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155. Learned counsel further submitted what is illegal under s 24(e) of the Act is the 'sale of influence' and not influence per se.

[46] To answer this point, we respectfully endorse the following judgment of the Federal Court in *Merong Mahawangsa* at p 240:

[61] But the distinction between what is and what is not the sale of influence may

not be obvious at times, as seen to have been the case in *David Wong Hon Leong v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155, and in *Ahmad Zaini bin Japar v TL Offshore Sdn Bhd* [2002] 7 MLJ 604; [2002] 5 CLJ 201.

[62] In *Wong Hon Leong*, the appellant sought the assistance of the respondent, who said he knew the Menteri Besar of Selangor, to expedite the conversion and subdivision of the company's lands, for its development into a housing estate. The appellant agreed to pay a fee of RM268,888 ('the fee') for the respondent's services. Later the appellant also agreed to pay an additional fee of RM100,000 for the respondent's assistance to obtain a right of way over an adjoining land. The respondent wrote a letter using the company's letter to the Menteri Besar, asking for assistance for an early approval of the application. The appellant paid RM100,000 to the respondent when he produced the letter with the handwritten word 'Disokong' addressed to the land administrator and signed by the Menteri Besar. Later, the land administrator informed the company that its application had been approved. The required right of way was eventually obtained. However, the appellant refused to pay the remaining fee of RM168,000 and the additional fee of RM100,000. The respondent applied for summary judgment. The appellant argued in his defence, inter alia, that: (a) there was no consideration for the alleged agreement; (b) the respondent did nothing to earn his fee; (c) the agreement was void for illegality as the approval had already been granted at that point in time and the money was in fact a bribe. The judge rejected all the appellant's defences for not amounting to bona fide triable issues, entered judgment for the sum of RM168,000 and granted unconditional leave to the appellant to defend in respect of the additional fee of RM100,000.

[63] On appeal to the Court of Appeal, the appellant reagitated three issues raised before the trial court, namely '(i) the plaintiff told the defendant that he knew the Menteri Besar of Selangor, some exco members and some Government officers and he was promised that he could expedite the conversion of the property. That would be illegal under ss 24 and 25 of the Contracts Act 1950; (ii) he did nothing, therefore there was no consideration, and, (iii) they took this big sum of money and did nothing'. ...

...

...

[70] As said, whenever the illegality of a contract is raised or become apparent, it is the duty of the court to take it up, by reference to s 24 of the Act. In *Wong Hon Leong*, the allegation of illegality should have been considered by reference to s 24(e) of the Act and the pertinent case law. But unfortunately, not a single authority on illegality on the ground of public policy was considered in *Wong Hon Leong*. Instead only *Lampleigh*, an authority on past consideration in assumpsit that was decided just immediately after the Middle Ages, was relied on to rule against illegality. With respect, the Common Law of England has so developed that it would rule against the sort of service provided by *Lampleigh* for a fee.

[47] *Merong Mahawangsa* also dealt with the case of *Ahmad Zaini bin Japar v TL Offshore Sdn Bhd* [2002] 7 MLJ 604; [2002] 5 CLJ 201 which followed *Wong Hon Leong*. In *Ahmad Zaini Japar*, the defendant requested the plaintiff

to provide advisory services and assistance and to negotiate with several agencies for the purpose of procuring a contract for the defendant with Petronas Carigali. In consideration thereof, the plaintiff was to be paid an amount equivalent to 1% of the contract value, subject to a limit of RM12m. The plaintiff rendered the advisory services and succeeded in securing for the defendant a contract valued at RM2.1 billion. The defendant paid RM700,000 to the plaintiff. When the defendant failed to pay the outstanding sum, the plaintiff sued the defendant and sought to enter summary judgment while the defendant applied to strike out the plaintiff's claim. The deputy registrar entered summary judgment against the defendant and dismissed the defendant's application.

[48] The defendant appealed to the judge-in-chambers where it was argued, among others, that the plaintiff's activity was illegal on the basis that the plaintiff, being a third party, was able to influence the private and internal machinery of a national oil company in the award of a multi-million ringgit contract irrespective of more competitive and deserving bidders. It would appear from the grounds of judgment that the illegality point on the ground of public policy was only taken up by the defendant after it was argued that the agreement did not exist; was ultra vires and was in contravention of company law or some other statute.

[49] The learned judge held that illegality on the ground of public policy was not particularised and was also not proved. His Lordship followed the decision in *Wong Hon Leong* and ruled that the agreement was perfectly within the domain of the Act.

[50] Both *Wong Hon Leong* and *Ahmad Zaini Japar* held that the contracts were good under s 2 of the Act which reads as follows:

> When, at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains from doing, or promise to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

Nonetheless the Federal Court through Jeffrey Tan FCJ stated the following at p 243 of *Merong Mahawangsa*:

> [69] But with utmost respect to both courts, it was entirely wrong to deal with the allegation of illegality by reference to s 2 of the Act. A contract may be good under s 2 of the Act but yet bad under s 24 of the Act. It was entirely wrong in law to uphold an illegal contract from the aspect and on the basis of s 2 of the Act. If it were to be decided under s 2 of the Act, then s 24 of the Act and its purpose to render void the stated unlawful consideration and unlawful objects, would be rendered effete and meaningless, such as if had no use at all.
>
> ...

A ...

Section 24 is a codification of the English Common Law. Therefore, it is contrary to Malaysian public policy that a person be hired for money or valuable consideration, to use his position and influence to procure a benefit from the government, as the sale of influence engenders corruption and undermines public confidence in the
B government, which is inimical to public interest. ...

We digress to underscore that *Lampleigh* was not an authority on public policy. In the corollary, the case that applied *Lampleigh* to uphold the alleged illegal contract, namely *Wong Hon Leong*, was decided per incuriam, and which, with respect, we now expressly overrule, on the illegality point.

C

[51] In the instant appeal, it is clear from the evidence that the plaintiff has the position, influence and good relationship with the Prime Minister cum Minister of Finance, Minister of Higher Education and various officers and
D that it was through the plaintiff's acquaintance and good relationship with the above personalities that he succeeded in procuring the UMS projects for the second defendant. Hence, notwithstanding the fact that the plaintiff did not state expressly in his evidence that he had used his influence or good relationship with the government, we find that the principles enunciated in
E *Merong Mahawangsa* are applicable to the instant appeal. We are thus constrained to uphold the findings of the trial judge that the oral agreements are illegal under s 24(e) of the Act.

Section 66 of the Contracts Act 1950

F

[52] Learned counsel submitted that having ruled that the contracts were illegal, the learned trial judge ought to have, but failed to give effect to the provisions of s 66. In this regard, the plaintiff had spent RM143,000 to renovate the first defendant's property. It was learned counsel's submission that
G this amount ought to be returned to the plaintiff.

[53] Section 66 of the Act reads:

66 Obligation of person who has received advantage under void agreement, or contract that becomes void
H

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

I **[54]** Sinnadurai on *Law of Contract Fourth Edition* at p 694 states the following:

It is clear that section 66 is a restitutionary provision and any remedy granted under the section is not based strictly on contract. The general principles under English law are that the courts will not enforce nor grant any remedy under an illegal

> contract. However, one of the main exceptions to this rule is that an innocent party may obtain certain remedies, whereas no remedy is available to a guilty party. Section 66 is a wide provision which has no direct parallel under English law. English cases, are therefore, not relevant in determining the scope of section 66. If the agreement 'is discovered to be void' section 66 shall apply.

At p 701, learned author continues:

> *Where parties are in pari delicto*. No relief under section 66 may be granted to either party to an illegal agreement if both the parties had full knowledge of the illegality at the time when the agreement was entered into. Indeed it would be against public policy to allow any party to obtain relief who knowingly entered into an illegal contract.

[55] The occupation (and thereafter the renovation) of the first defendant's property by the plaintiff were pursuant to the illegal oral agreements. In our judgment, the parties were in *pari delicto* when they entered into the illegal oral agreements. As such the plaintiff is not entitled to be restored or compensated for the expenses spent on the renovation of the said property as this is not a case where the contract may be said to be discovered to be void under s 66 of the Act (see *Soh Eng Keng v Lim Chin Wah* [1979] 2 MLJ 91; *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141). The loss of the plaintiff shall lie where it falls.

[56] We therefore agree with the learned trial judge who had allowed the first defendant's counterclaim for the recovery of the possession of the property without making an order for restitution of the amount expended by the plaintiff for the renovation.

[57] To conclude, we find no merits in the appeal. The appeal is consequently dismissed with costs and the order of the High Court is affirmed.

Appeal dismissed with costs.

Reported by Kohila Nesan